
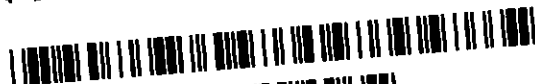


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WESTERN DISTRICT OF WASHINGTON
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CV 01-00775 #00000066

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

RAHN D. JACKSON, *et al.*,
Plaintiffs,
v.
MICROSOFT CORPORATION,
Defendant.

CASE NO. C01-775P

**DEFENDANT MICROSOFT
CORPORATION'S MEMORANDUM IN
SUPPORT OF ITS MOTION TO DISMISS
WITH PREJUDICE ALL CLAIMS OF
PLAINTIFF RAHN D. JACKSON**

ORAL ARGUMENT REQUESTED

**Noted for Motion Docket: Friday, August 31,
2001**

DEFENDANT MICROSOFT CORPORATION'S
MEMORANDUM IN SUPPORT OF ITS MOTION TO
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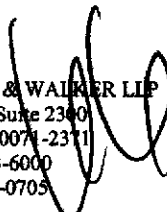
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1 **I. INTRODUCTION**

2 Plaintiff Rahn Jackson willfully and defiantly obstructed justice by receiving
3 thousands of stolen documents and then destroying evidence that he knew would be detrimental
4 to his claims. He admits it. Dismissal of the lawsuit he intentionally tainted is the only
5 appropriate remedy.

6 To gain an advantage in this case, Jackson admits that he requested “help” and
7 then accepted from his co-conspirator (whom he refuses to name) a compact disc (“CD”)
8 containing more than 10,000 e-mail and other documents stolen from his boss’s computer. From
9 this misappropriation, Jackson garnered documents containing trade secrets about Microsoft’s
10 business strategy vis-à-vis major competitors and, more to the point, communications between
11 Microsoft and its attorneys about Jackson and his case. No coincidence, Jackson procured the CD
12 of his boss’s hard-drive after he had signed an employment offer letter from Sun Microsystems,
13 but before actually submitting his resignation to Microsoft. Indeed, Jackson received the stolen
14 material and then, a few hours later, quit his job and went to work for one of Microsoft’s largest
15 competitors.

16 Nor is there any question this entire case – not just Jackson’s claim – has been
17 compromised by Jackson’s actions. Because he obtained the stolen property (including the
18 attorney-client communications regarding his claims) more than ten months ago, Jackson has had
19 ample time to review and commit these documents to memory. And, we must recall, Jackson has
20 positioned himself as the initial litigant and leader in this case. He traveled to Washington State
21 to meet with other Microsoft employees to offer his opinions about this suit and recount his
22 claims. (During his four-hour meeting with putative class members and others, Jackson “did a lot
23 of the talking.” (Tr. 242:2-247:18.)) He brought six other plaintiffs into his lawsuit. He engaged
24 additional counsel. He filed an amended complaint, adding class-wide claims. And he did all this
25 after receiving and retaining possession of 10,000 stolen, confidential documents, including
26

1 attorney-client communications between his adversary and its counsel. The ramifications of
2 Jackson's illegal actions tainting this case are staggering.

3 Jackson is not abashed about his actions; he does not regret his decision to accept
4 and disseminate (across state lines) more than 10,000 stolen documents. To the contrary, Jackson
5 proudly tells us that he intends to use these documents to prosecute this case.

6 Stealing documents is not the extent of Jackson's bad acts. After filing this
7 lawsuit, Jackson altered and destroyed relevant documents by tearing or cutting off portions of the
8 documents and then shredding the missing pieces. Yet again, there is no dispute, no question that
9 Jackson altered these documents and destroyed evidence. He admits it.

10 The totality of Jackson's admissions are stunning. At his deposition, Jackson: (a)
11 admitted that the CD was stolen; (b) admitted that he knew the disc was stolen when he received
12 it; (c) acknowledged that the disc contained both privileged and commercially sensitive
13 information (including trade secret information about Microsoft's competition with Jackson's
14 new boss, Sun Microsystems); (d) admitted that he doctored documents he produced, and did so
15 with the intended purpose of preventing Microsoft from obtaining further discovery about those
16 documents; and (e) admitted that he intends to use all of the evidence of his crimes in prosecuting
17 this case.

18 Jackson's defiance is an appalling affront to this Court, due process, and the aims
19 of our justice system. Nonetheless, at his deposition, Jackson actually expressed pride in his
20 felonies:

21 Q: [W]here did you get the CD from? (Tr. 52:18-19)

22 A: I got the CD from an employee at Microsoft. (Tr. 53:14-15)

23 * * *

24 Q: You received stolen property[?]

25 A: Okay. All right. Well, I will use that evidence to advance the
26 cause of erasing racism at Microsoft. Yes, I will. (Tr. 439:2-5.)

1 Q: Do you believe that an employee who is discriminated against has
2 a right to obtain stolen property from Microsoft?

3 A: Hmm, I do not believe in stealing But I believe in doing anything
4 without hurting individuals physically and otherwise, to erase
5 racism at Microsoft. (Tr 434:7-13.)

6 In responding to discovery abuses, the Court has a broad array of weapons at its
7 disposal. Courts typically seek to find the least onerous sanction that will accomplish the Court's
8 punitive and remedial aims. Given the extent of the illegal activity that taints this case, however,
9 only one sanction can appropriately follow from Jackson's felonious insult to the Court and our
10 justice system. Thus, pursuant to the Court's inherent authority "to manage [its] own affairs,"
11 Jackson's case must be dismissed. Link v. Wabash R. Co., 370 U.S. 626, 630-31 (1962)

12 II. FACTUAL BACKGROUND

13 Plaintiff Rahn Jackson sat for deposition in this employment discrimination suit on
14 July 26 and 27, 2001. At the start of that deposition, Jackson produced documents in response to
15 Microsoft's discovery requests, including a CD and a limited number of documents printed from
16 that disc. (Tr. 52:5-53:15.) According to Jackson, this disc contains at least 10,000 e-mails from
17 Microsoft's federal district office (he thinks there "could be" as many as 20,000 e-mails). (Tr.
18 56:1-14; 391:6-10.) Jackson testified that he received this CD on September 28, 2000 – hours
19 before he and his counsel met with Microsoft's in-house and outside counsel, and one day before
20 he resigned from Microsoft and went to work for competitor Sun Microsystems. (Tr. 97:5-9;
21 98:6-14; 101:12-17; 280:14-18; 404:2-6; 469:12-15.) Jackson provided a printed copy of some of
22 the documents on the CD to his attorneys. (Tr. 367:7-10; 373:1-6; 385:3-9.) He did so, knowing
23 that confidential and privileged information was on that CD. At the time of his deposition
24 Jackson admittedly already had spent approximately 30-40 hours over a one- to two-week period
25 reading the stolen materials. (Tr. 277:9-278:13.)
26

A. Jackson Retained Stolen Property Belonging To Microsoft.

1. The Stolen CD Contains Privileged Attorney-Client Communications, As Well As Highly Sensitive Trade Secrets And Proprietary Information.

During his deposition, Jackson admitted that, in reviewing the pilfered documents, he read e-mails authored by, among others, Richard Sauer (who, as Jackson recognized, is Microsoft's in-house counsel assigned to the Jackson case), and Ellen Dwyer (who, as Jackson also recognized, was Microsoft's outside counsel charged with defending the Company against Jackson's claims). (Tr. 279:20-280:18; Tr. Vol. 1, 64:16-65:21.) Jackson, in other words, knowingly read communications by and between Microsoft's attorneys in which they discussed his case In fact, the stolen disc contains a number of privileged Microsoft attorney-client communications, including: (1) attorney-client privileged communications from Microsoft's legal department giving legal advice to management regarding Jackson after he filed his lawsuit; and (2) attorney-client privileged communications between Microsoft management and its legal department seeking and/or providing legal advice on other issues. (Pete Hayes Declaration ("Hayes Dec.") ¶ 4(a) and (b))

In addition to these privileged communications, the stolen CD includes numerous documents containing highly sensitive trade secrets and proprietary information (information, for the most part, to which Jackson was not privy when employed at Microsoft). These include e-mails containing proprietary information about Microsoft's customers, prospects and pricing, and strategies for competing against Sun Microsystems — one of Microsoft's primary competitors and the company with which Jackson accepted a job before leaving Microsoft. (Hayes Dec. ¶ 4(c).) Microsoft estimates conservatively that, should it choose to use the stolen information that Jackson received and read after he and Sun signed an employment contract, Sun would be well-

1 positioned to add a minimum of \$5 million of government server business. (Id. at ¶ 5; Tr. Exh.
2 1.)

3 As of this writing – less than a week after receiving the purloined CD – Microsoft
4 has not been able to fully review the vast amount of stolen material contained on that CD.
5 Pursuant to its still-minimal review of the documents, however, Microsoft has been able to
6 ascertain that, in addition to attorney-client communications and trade secrets, the CD also
7 contains extremely private and confidential information about Jackson’s coworkers. Thus, the
8 CD contains detailed performance evaluations, as well as documents spelling out the coworkers’
9 salaries, their bonuses, their stock options.

10 Jackson, of course, is aware that compensation data about other employees is
11 confidential personnel information that he was not authorized to possess. (Tr. 261:1-4.)

12 **2. Jackson Lied About How He Received This CD.**

13 Jackson tells us that he obtained the stolen CD by asking an individual who knew
14 about his lawsuit against Microsoft “if there [was] anything that [this individual] can do to help
15 . . . [i]n this matter” (Tr. 57:6-15.) Subsequent to this communication, said Jackson, the “help” he
16 had requested was offered: “sometime later I received the CD in my box, in my mailbox.” (Tr.
17 59:3-19.)

18 After making these statements under oath, Jackson back-peddled, suddenly
19 claiming that he did not know who provided him with the CD:

20 Q: Did you know who [the CD] came from?

21 A: No, I didn’t. (Tr. 59:21-60:1)

22 * * *

23 Q: And then did you know who gave it to you?

24 A: No, I did not. (Tr. 60:9-11)

25

26

1 But this testimony not only contradicted Jackson's prior testimony, in which he admitted he
 2 received the CD after asking this co-worker for "help," but also was inconsistent with his
 3 subsequent testimony. Apparently unable to keep his stories straight, Jackson admitted that, after
 4 receiving the CD in his mailbox, he personally thanked the individual from whom he previously
 5 had sought assistance: "When they gave me the disk, I said thank you." Acknowledging
 6 Jackson's "thanks," the person responded, "you are welcome" or "no problem." (Tr. 468:4-20.)
 7 Finally, when asked to identify the individual who took the CD, Jackson refused, claiming that he
 8 wanted to "protect [the individual's] career." (Tr. 52:18-54:13; 60:12-61:4; 209:13-210:6; 211:7-
 9 9; 366:3-4; 536:12-537:15.) This, of course, is a further indication that, contrary to his testimony
 10 a few pages back, he knew who stole the documents.

11 In sum, Jackson is making a mockery of the judicial process, altering his story
 12 with every turn of the transcript page.

13 **3. Jackson Admitted That He Knowingly Received Stolen Property And**
 14 **That It Is Against The Law To Receive Stolen Property.**

15 Jackson unequivocally admitted during his deposition (1) that he knew the CD
 16 data was stolen; (2) that he nevertheless accepted it; (3) that he is using the contents of the CD as
 17 evidence in his case – and intends to continue doing so; and (4) that he has reviewed the CD,
 18 culled the most relevant documents, printed them out, and given them to his lawyers. (Tr. 79:3-
 19 19; 277:9-278:13; 367:7-10; 382:4-8; 385:3-9.) Jackson now tries to justify this astonishing
 20 behavior by pointing out his desire to win this case:

21 Q: Now, were you at all concerned that Microsoft or law enforcement
 22 could take legitimate legal action against the individual who
 23 procured the documents from Microsoft's system and put them on
 the CD that is in your possession?

24 A: Of course. (Tr. 432:15-21.)

25 * * *

1 Q Did you always understand, since you have been an adult, that
2 receiving stolen property was a crime?

3 A. Yes, I did.

4 Q: Do you have any concern today that you are in possession of
5 stolen property?

6 A: I have concerns as a citizen, I have concerns as a former
7 employee, but those concerns do not outweigh my concerns of
8 what is taking place at Microsoft today in response to my
9 allegations, in response to the retaliation and everything that is
10 going on here today, Ms. Abell, to be quite honest with you.

11 Q: So you think your view of what happened to you justifies your
12 being in possession of stolen Microsoft property; is that correct?

13 A: I'm just doing whatever I can to protect my rights, to defend my
14 rights, and those like me. (Tr. 435:9-436:7.)

15 * * *

16 Q: And so if you need to obtain and retain stolen property in order to
17 protect your rights, you believe you are justified in doing that so
18 long as you do not harm somebody in a bodily fashion; is that
19 correct?

20 Ms. Sperando [Jackson's counsel]: Form. That's not what he said.

21 A: No. If I run across valuable information and evidence that will
22 help erase racism at Microsoft, then I will use that.

23 Q: You will use stolen property in your view in order to do that; is
24 that correct?

25 A: I will use that evidence as I have received it, as I did not steal it, I
26 received it.

Q: You received stolen property.

A: Okay. All right. Well, I will use that evidence to advance the
cause of erasing racism at Microsoft. Yes, I will. (Tr. 438:8-
439:5.)

Jackson's testimony is stunning in its cynicism. In an effort to win a case, says
Jackson, he is privileged to use stolen property, rifle through his coworkers' personnel
information, spy on attorney-client communications. Indeed, he tells us that he took these
documents, not inadvertently, but as ammunition for the prosecution of his case. Thus, given the

1 breadth and extraordinary ramifications of Jackson's intentional misconduct, dismissal is
 2 warranted. Simply put, Jackson cannot continue to prosecute an action he intentionally and
 3 completely compromised.

4 **4. Jackson Gave A Copy of Documents From the Stolen CD To His**
 5 **Attorneys For Use In Devising Their Litigation Strategy And**
 6 **Discussed The Contents With Others, Including Plaintiff's Counsel**
 7 **And Co-Plaintiff Tanya Barbour, Who Is Represented by the Same**
 8 **Counsel.**

9 Jackson provided documents printed from the stolen CD to his attorneys
 10 approximately a week or two before his deposition:

11 Q: When was the first time you gave to counsel any documents on the
 12 CD?

13 * * *

14 A: I FedExed them, I believe, last Tuesday or Wednesday . . . It was
 15 either last week or the week before. (Tr. 79:3-19.)

16 * * *

17 Q: So you thought your counsel would go through all the material on
 18 the CD for you?

19 A: Eventually. Well, not the CD, but **I would eventually get the
 relevant information from that CD and provide it to counsel as
 I did.** (emphasis added) (Tr. 382:4-8.)

20 Thus, according to Jackson himself, counsel from both of the law firms representing him in this
 21 suit received from him – and read – at least some of the privileged and other stolen documents.
 22 (Tr. 264:1-3; 519:18-21.) Moreover, Jackson tells us that he had conversations with his counsel
 23 about the CD. (Tr. 398:10-399:2.)

24 Jackson also shared the material with others. As another example of his constantly
 25 shifting testimony, Jackson initially testified that the only individuals who had seen any
 26 documents on the CD were himself, his counsel, and the individual who provided him with the

1 stolen CD. Jackson subsequently admitted, however, that he also had discussed the contents of
 2 the CD with a former colleague. (Tr. 78:12-15; 375:1-4; 381:4-16; 398:10-399:3.) Later, he
 3 added that he showed this individual an e-mail he had printed from the CD. (Tr. 377:21-378 4.)
 4 (Jackson refused to disclose the name of this former colleague, or other information about their
 5 communications, even though his counsel did not instruct him not to answer. (Tr. 373:20-
 6 375:10.)) Still struggling with the truth, Jackson later admitted that he also told Tanya Barbour,
 7 another plaintiff in this action, about the CD. (Tr. 401:14-403:11; 439:10-440:4.)

8 By the end of the day, Jackson finally admitted that his lawyers, two coworkers,
 9 and a co-plaintiff had been privy to these materials in some way. Given Jackson's veracity, there
 10 may well be (many) others.

11 **5. After Filing His Lawsuit, Jackson Tore Up And Shredded Portions of**
 12 **Documents Responsive to Discovery Requests And Pertinent to Claims**
 13 **and Defenses in the Lawsuit.**

14 In addition to the CD-related misconduct described above, Jackson admitted that,
 15 after this litigation began, he destroyed or doctored relevant documents. Yet again, Jackson's
 16 testimony about this misconduct changed dramatically during the course of the deposition. At
 17 first, Jackson testified as follows:

18 Q: Directing your attention to the documents that you produced in
 19 Exhibit 13, there [are] several that have parts of the pages cut off
 20 with the scissors, tops of the documents, or ripped off by hand.
 Did you remove the tops of these documents?

21 A: No.

22 Q: Do you know who did?

23 A: I'm assuming the provider of those documents to protect their
 confidentiality. (Tr. 405:13-406:1.)

24 Thereafter, however, Jackson admitted that he was responsible for the damage to all but one of
 25 these documents, and that he affected the alterations after filing his lawsuit. With respect to
 26

1 Exhibit 15, for example, Jackson stated "I cut that particular one off," and shredded the portion he
 2 cut off. (Tr. 407:4-408:17, Tr Ex. 15.) He explained that the information he cut off was "the
 3 most important information that [he] wanted to conceal from [Microsoft]." (Tr. 408:18-409:19.)
 4 Jackson also admitted that he ripped off the top left corners of Exhibits 17 and 18 (Tr 412:5-17;
 5 413:1-414:2), and took scissors and cut off the tops of Exhibits 19 and 20, which he thereafter
 6 shredded or discarded. (Tr 415:9-417:12.) He justified his conduct as protecting the
 7 confidentiality of the provider. (See, e.g., Tr. 412:18-21; 408:18-417:12.) Significantly, Jackson
 8 altered these documents long after his case against Microsoft had been filed. (Tr. 407:15-409:19;
 9 412:12-17; 413:16-414:2; 415:9-416:1; 416:16-417.7.)

10 **6. Jackson Lied To The Microsoft Representatives, Covering Up The**
 11 **Fact He Had Confidential Microsoft Documents In Violation of His**
 12 **Employee Non-Disclosure Agreement.**

13 Apart from the criminal implications of his conduct, Jackson also breached the
 14 Microsoft Corporation Employee Non-Disclosure Agreement – an agreement he signed in order
 15 to come to work at Microsoft. Pursuant to that Agreement, Jackson promised to return all
 16 documents and other material containing or disclosing any confidential or proprietary technical or
 17 business information upon the termination of his employment. (Tr. Ex. 21.)

18 During his exit interview, Jackson expressly told the Microsoft Human Resources
 19 representative that he had returned all of Microsoft's property except for a printer. (Tr. 428:14-
 20 19.) Yet again, he lied. After he quit, Jackson retained not only the stolen CD with his manager's
 21 e-mail, but also several years of his own Microsoft e-mail on the hard drive of the laptop he
 22 purchased from the Company. (Tr. 48:18-49:11)

1 **III. JACKSON'S CONDUCT WARRANTS DISMISSAL OF HIS CASE.**

2 **A. Dismissal Is The Only Appropriate Response To Jackson's Repeated**
 3 **Criminal Conduct.**

4 A district court has the inherent power to dismiss a complaint if there has been
 5 "flagrant, bad faith disregard of discovery duties." Wanderer v. Johnston, 910 F.2d 652, 656
 6 (9th Cir. 1990) (citing National Hockey League v. Metropolitan Hockey Club, Inc., 427 U.S. 639
 7 (1976)). This power is "governed not by rule or statute but by the control necessarily vested in
 8 courts to manage their own affairs so as to achieve the orderly and expeditious disposition of
 9 cases." Link v. Wabash R.Co., 370 U.S. 626, 630-31 (1962). Further, a court may impose a
 10 dismissal sanction, "not merely to penalize those whose conduct may be deemed to warrant such
 11 a sanction, but to deter those who might be tempted to such conduct in the absence of such a
 12 deterrent." National Hockey League, 427 U.S. at 643.

13 The Ninth Circuit has identified a number of factors relevant to a dismissal
 14 sanction, including (1) the existence of extraordinary circumstances, and the presence of
 15 willfulness, bad faith, or fault by the offending party, (2) the efficacy of lesser sanctions, (3) the
 16 relationship or nexus between the misconduct drawing the dismissal sanction and the matters in
 17 controversy in the case, and (4) the prejudice to the party victim of the misconduct. Estrada v.
 18 Speno & Cohen, No. 99-56013, 2001 U.S. App. LEXIS 5225, at *12 (9th Cir. Mar. 30, 2001)
 19 (default judgment case applying dismissal standard set forth in United States v. Hughes Aircraft
 20 Co., 67 F.3d 242, 247 (9th Cir. 1995)).

21 In this case, Jackson has admitted – in sworn testimony – to conduct which likely
 22 constitutes numerous felonies, including (1) theft/misappropriation of trade secrets under 18
 23 U.S.C. § 1832(a), a statute which was designed to prevent "employees (and their future
 24 employers) from taking advantage of confidential information gained, discovered, copied or
 25 taken while employed elsewhere," see United States v. Martin, 228 F.3d 1 (1st Cir. 2000),
 26

1 (2) conspiracy to commit theft/misappropriation of trade secrets 18 U.S.C. § 1832(a)(5),
 2 (3) unauthorized access of a computer, 18 U.S.C. § 1030 (prohibiting in part unauthorized access
 3 to a computer and obtaining information therefrom), (4) obstruction, 18 U.S.C. § 1509, and, (5)
 4 under state law, theft/misappropriation (D.C. Code § 22-3811 & Md. Ann. Code art. 27, § 341),
 5 receipt of stolen property (D.C. Code § 22-3832) and malicious destruction of property (D.C.
 6 Code Ann. §§ 22-203 & Md. Ann. Code art. 27, § 111).

7 Jackson also has declared his intention to use the fruits of his crimes in pursuit of
 8 money damages, and has expressed no remorse for his criminal conduct. To the contrary, in
 9 Jackson's view, the end justifies the means. His felonies have been carefully considered and
 10 well-planned; they have been numerous and repeated; he has solicited others to join his criminal
 11 enterprise; and his felonies were directed – avowedly and unashamedly – to the merits of this
 12 litigation. And, he says, he would do it again. One could hardly conjure a more calculated,
 13 dramatic, outrageous affront to the Court.

14 Few cases parallel the facts in this case; few litigants are as brazen in their crimes
 15 or are self-congratulatory enough to declare — repeatedly and under oath — that they knew the
 16 conduct was illegal, but nonetheless intend to use doctored and stolen evidence in court. In
 17 Anheuser-Busch, Inc. v. Natural Beverage Distributors, 69 F.3d 337, 348 (9th Cir. 1995), the
 18 Ninth Circuit upheld the dismissal of a party's counterclaim following a pattern of lying — to
 19 opposing counsel and to the court — and concealing documents. In response to this behavior,
 20 the court was adamant: "It is well settled that dismissal is warranted where, as here, a party has
 21 engaged deliberately in deceptive practices that undermine the integrity of judicial proceedings."
 22 In Hi-Tek Bags, Ltd. v. Bobtron Int'l, Inc., 144 F.R.D. 379 (C.D. Cal. 1992), the plaintiffs
 23 agreed to limit dissemination of the defendant's confidential documents, but failed to comply
 24 with their promise. Instead, they attached confidential pricing and sourcing information to an
 25 opposition filed and served on codefendants, some of whom were defendant's competitors. The
 26

1 court noted the potential damage done to defendant as a result of the disclosure, and
2 characterized the disclosure as "utterly inconsistent with the orderly administration of justice."

3 Similarly, in In re Wisehart, 281 A.D.2d 23, 25 (N.Y. App. Div. 2001), the
4 plaintiff stole privileged material from defendant's counsel while at a discovery conference;
5 plaintiff's lawyer was suspended from the practice of law for two years for accepting and using
6 the material. In affirming that discipline, the appellate court quoted the trial court's order
7 dismissing the case: "[T]he actions of the plaintiff and her attorney were so egregious [and] so
8 heinous that the only remedy . . . is to dismiss the lawsuit. Otherwise, there is no meaning to
9 privilege, there is no meaning to conduct among attorneys, and there is no rule of law." See also
10 Combs v. Rockwell Int'l Corp., 927 F.2d 486, 488 (9th Cir. 1991) (case dismissed for
11 falsification of deposition where plaintiff gave counsel permission to alter any of his deposition
12 responses, and despite his sworn statement to the contrary, he never reviewed either the original
13 or the altered deposition transcripts.").

14 Courts have also dismissed cases in which a party was responsible for the
15 spoliation of evidence. In Miller v. Time-Warner Communications, Inc., 1999 WL 739528
16 (S.D.N.Y. Sept. 22, 1999), the plaintiff tried to alter documents, then lied about it at deposition
17 and in court. The court dismissed her discrimination suit as a result. "The question presented is
18 what the appropriate sanction is for plaintiff's spoliation of evidence and these repeated instances
19 of perjury. Having weighed the seriousness of plaintiff's misconduct against the range of
20 sanctions that might be invoked, the Court concludes that the only appropriate sanction is to
21 dismiss the complaint." Id. at *2. See also Cabinetware Inc. v. Sullivan, 1991 WL 327959, at *4
22 (E.D. Cal. July 15, 1991) (entering default judgment on ground that "[d]estruction of evidence
23 cannot be countenanced in a justice system whose goal is to find the truth through honest and
24 orderly production of evidence under established discovery rules") (citation omitted), Synanon

1 Church v. United States, 820 F.2d 421, 428 (D.C. Cir. 1987) (affirming dismissal of lawsuit
2 where the plaintiff “intentionally and willfully destroy[ed] discoverable material”).

3 And lying under oath should bring the severest sanction Jackson’s deposition
4 shows that he “will say anything at any time in order to prevail in this litigation.” Anheuser-
5 Busch, Inc., 69 F. 3d at 348. He forever will remain an inherently unreliable witness, thus
6 leaving this Court “no choice but to dismiss.” Id.

7 The misconduct in the published cases pales in comparison to Jackson’s criminal
8 scheme. None of these cases involved a party who – a self-appointed leader of six other named
9 plaintiffs and an entire putative class – was brazen enough to try to justify as a valid litigation
10 strategy both theft and document alteration. These facts are, so far as Microsoft has been able to
11 determine, unique, and uniquely aggravated. If dismissal was appropriate in the cases cited
12 above — indeed, if dismissal is ever warranted — plainly dismissal is warranted here.

13 **B. The Consequences Of Jackson’s Misconduct Cannot Be Erased By Any Other**
14 **Possible Response.**

15 As previously mentioned, dismissal is warranted by the gravity of Jackson’s
16 misconduct alone, “not merely to penalize those whose conduct may be deemed to warrant such
17 a sanction, but to deter those who might be tempted to such conduct in the absence of such a
18 deterrent.” National Hockey League, 427 U.S. at 643. But even if the Court were to look
19 beyond these punitive and deterrent interests to consider the ramifications of Jackson’s
20 misconduct, it is apparent that there is simply no remedy for his actions; dismissal is the only
21 available response.

22 Jackson and his lawyers have read communications among and between
23 Microsoft executives, the Company’s in-house lawyers, and outside counsel working on
24 Jackson’s case. Jackson’s claims were the subject of these communications. Neither Jackson,
25 nor his lawyers, nor other individuals to whom he has shown the stolen, privileged information,
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1 can be expected to forget what they have read, or to compartmentalize their understanding of
 2 these communications in a way that "walls off" the information they have obtained by Jackson's
 3 illegal conduct. In affirming the dismissal of a case where a plaintiff alleging sexual harassment
 4 took a privileged memorandum belonging to defense counsel and shared it with her attorney, the
 5 New York Court of Appeals stated:

6 Clearly neither suppression of the documents nor suppression of
 7 the information was a realistic alternative. Nor would
 8 disqualification of plaintiff's counsel have ameliorated the
 9 prejudice, in that the wrongdoing and the knowledge were the
 10 client's own, which she would carry into any new attorney-client
 11 relationship

12 Lipin v. Bender, 644 N.E.2d 1300, 1304 (N.Y. 1994).

13 The law recognizes that, once exposed to stolen information, the reader is forever
 14 tainted and the crime continues, buried in the information forever stored in the mind. E.g., Ed
 15 Nowogroski Insurance, Inc. v Michael Rucker, 137 Wash. 2d 427, 445 (1999) ("The Uniform
 16 Trade Secrets Act does not distinguish between written and memorized information. The Act
 17 does not require a plaintiff to prove actual theft or conversion of physical documents embodying
 18 the trade secret information to prove misappropriation."). Certainly that kind of irrevocable
 19 exposure has happened here. No matter how limited Jackson's or his counsel's review of the
 20 documents might have been, what they saw and read is with them forever.

21 For all of these reasons, there is no viable alternative to dismissal. Any less
 22 vigorous response will encourage other litigants to embark on similar schemes, reward (or, at
 23 least, leave unpunished) Jackson's unapologetic misconduct, and severely prejudice Microsoft,
 24 which would be left to defend against a claim where its adversaries have been privy to legal
 25 advice Microsoft attorneys offered its client in this very matter. Dismissal is required.

26 IV. CONCLUSION

Plaintiff Rahn Jackson methodically planned and implemented a criminal scheme
 intended, as an initial matter, to thwart the legitimate discovery processes of this Court and

1 unfairly advantage himself. His scheme having come to light, he trumpets the virtues in his
2 crimes and declares that he has every intention of using the fruits of that scheme to his own
3 benefit. Such a bold and defiant disregard of this Court's authority demands the most vigorous
4 response within the Court's authority. Jackson's claims should be dismissed with prejudice.

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